

No. 11630

United States
Circuit Court of Appeals
For the Ninth Circuit.

B. SAMUELS,

Appellant,

vs.

UNITED SEAMEN'S SERVICE, INC.,
a non-profit organization,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

JUN 11 1947

PAUL T. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

MR. THEODORE M. MONELL,

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San Francisco, California.

Attorney for Plaintiff and Appellant.

MR. J. J. DOYLE,

519 California Street,
San Francisco, California,

Attorney for Defendant and Appellee.

In the Superior Court of the State of California
in and for the City and County of San Francisco

No. 354446

(District Court No. 26171G)

B. SAMUELS,

Plaintiff,

vs.

UNITED SEAMEN'S SERVICE, INC.,

a non-profit organization,

Defendant.

COMPLAINT FOR DECLARATORY RELIEF

Comes now the plaintiff above named, and, complaining of defendant above named, alleges the following:

I.

That at all times herein mentioned defendant above named was and now is a non-profit organization incorporated under the laws of the State of New York and authorized to do and doing business in the State of California and in the City and County of San Francisco in said State.

II.

That at all times herein mentioned plaintiff above named was and now is the owner of that certain building generally known, numbered and designated as 437-439 Market Street in San Francisco.

III.

That on or about September 15, 1943, plaintiff above named by written lease leased to defendant above named all of that certain store, together with the basement thereunder, generally known as 439 Market Street, together with the entire second and third floors of said building, the entrance thereto being generally known as 437 Market Street in San Francisco, being the premises hereinbefore mentioned.

That by the terms and provisions of said lease it was therein provided that the term thereof should commence on the 15th day of September, 1943, and extend for a period of six (6) months from and after the cessation of hostilities in the present war with Japan.

IV.

That by the words "cessation of hostilities in the present war with Japan," plaintiff and defendant intended to refer to the cessation of open and hostile warfare as accomplished by the surrender of Japan on August 14, 1945, and as distinguished from a Presidential or Congressional declaration of the end of the war, which event has not yet occurred and may not occur for some years in the future.

V.

That a dispute has arisen between the parties hereto as to the construction of said lease, particularly with reference to the termination date thereof, it being the contention of plaintiff herein that said lease terminated six (6) months from and after

August 14, 1945, to wit, on February 14, 1946, by virtue of the surrender of Japan upon said August 14, 1945, and the cessation of hostilities at the time of said signing.

That it is the contention of defendant herein that "the cessation of hostilities" refers to the time when the President or Congress shall declare said war to have terminated.

VI.

That it is provided in and by the terms and provisions of said lease that in case suit shall be brought for the recovery of any rent due or because of the breach of any other covenant contained in said lease on the part of lessee to be kept or performed, the lessee will pay to the lessor a reasonable fee which shall be fixed by the judge of the court as part of the costs of such suit. That a reasonable fee to be allowed herein is the sum of three hundred (\$300.00) dollars.

Wherefore, plaintiff prays for the judgement of this court declaring the rights of the parties hereto under said lease as aforesaid and specifically declaring that hostilities in the present war with Japan ceased on August 14, 1945, and that said lease by its terms ended and terminated on February 14, 1946, and for attorney's fees herein in the sum of three hundred (\$300.00) dollars, and for costs of suit incurred herein, and for such other and further relief as may be meet and proper in the premises.

THEODORE M. MONELL,
Attorney for Plaintiff.

State of California,
City and County of San Francisco—ss.

B. Samuels, being first duly sworn, deposes and says:

That she is the plaintiff named in the foregoing complaint; that she has read the said complaint and knows the contents thereof, and that the same is true of her own knowledge excepting as to the matters therein stated on information or belief, and as to such matters she believes it to be true.

B. SAMUELS.

Subscribed and sworn to before me this 13th day of June, 1946.

[Seal] DOROTHY H. McLENNAN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed July 2, 1946. C. W. Calbreath, Clerk.

In the United States District Court for the
Northern District of California
Southern Division

No. 26171G

B. SAMUELS,

Plaintiff,

vs.

UNITED SEAMEN'S SERVICE, INC.,
a non-profit organization,

Defendant.

ANSWER TO COMPLAINT FOR
DECLARATORY RELIEF

Comes now United Seamen's Service, Inc., a non-profit organization, and answering the complaint of plaintiff, admits, denies and alleges:

I.

Answering Paragraph IV of plaintiff's complaint, defendant denies that prior to or upon the occasion of the execution of the alleged lease that defendant used the phrase, "Cessation of hostilities in the present war with Japan," and/or that defendant directly or indirectly agreed, assumed or intended, either by inference, by positiveness, suggestion or words, or otherwise, that the termination date of said lease dependent and/or effective upon the contingency construction now sought by plaintiff.

II.

Answering Paragraph V, plaintiff's complaint, defendant denies that prior to or upon the occasion of the execution of the alleged lease that defendant used the phrase, "Cessation of hostilities at the time of said signing," and/or that defendant, directly or indirectly, agreed, assumed or intended, either by inference, positiveness, suggestion, words or otherwise that the termination date of said lease dependent and/or effective upon the contingency construction now sought by plaintiff.

And for a second and separate ground of defense, defendant alleges that said lease was drawn, originated and prepared by plaintiff; that if, at the time of the negotiations leading up to and/or the execution of said lease, plaintiff had in mind or intended that the effective termination date should commence to run from the contended for contingency, to-wit, cessation of "open and hostile warfare," that there was nothing to prevent plaintiff from covering, insisting or wording said lease.

And for a third and separate ground of defense, defendant alleges that cessation of "open and hostile warfare," would not eliminate the necessity and reasonableness of its contingencies either as to operations, and/or services and/or otherwise.

And for a fourth and separate ground of defense, defendant alleges that during its period of tenancy it has expended in improvements and repairs as of March, 1946, the amount of thirty thousand six hundred ninety-eight dollars and fifty-four cents

(\$30,698.54), and will be required to meet additional items of like nature in an undetermined sum.

And for a fifth and separate ground of defense, defendant alleges that said lease is based upon and involves the construction and interpretation by the divergent and sovereign powers of the world, and exclusively concerned or involved in or with war and post-war subject matters, resting solely between the authorized and legitimate governments of the United States of America and of the Japanese Empire and its people, effective only by duly approved and ratified treaties between said countries, and that the State of California is in no way a party concerned with any of the questions involved in this litigation.

And for a sixth and separate ground of defense, defendant alleges that it is a non-profit organization, a citizen, resident, and incorporated under and by virtue of the laws of the State of New York and not of the State of California; that plaintiff was and now is a citizen and resident of the State of California and was not and is not a citizen or resident of the State of New York.

That at all the times herein mentioned, defendant was and now is a citizen and resident of and incorporated under and by virtue of the laws of the State of New York and not at any time of the State of California, and that plaintiff was and now is a citizen and resident of the State of California and was not and is not a citizen or resident of the State of New York.

J. J. DOYLE,

Attorney for Defendant.

State of California,
City and County of San Francisco—ss.

Melvin Philbrick, being first duly sworn, deposes and says:

I am an officer, to-wit, the Port Area Executive of United Seamen's Service, Inc., a non-profit organization and corporation, defendant in the above-entitled action, and, as such, make this verification for and on behalf of said defendant; I have read the foregoing answer and I know the contents thereof, and the same is true of my own knowledge except as to matters therein stated on information or belief and as to those matters I believe it to be true.

/s/ MELVIN PHILBRICK.

Subscribed and sworn to before me this 3rd day of July, 1946.

[Seal] MARIE H. STANLEY,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires November 20, 1947.

Receipt of Service of Copy.

[Endorsed]: Filed July 8, 1946.

[Title of District Court and Cause.]

OPINION

Plaintiff brings this action for declaratory relief and alleges in substance that on the 15th day of

September, 1943, plaintiff and defendant entered into a written lease covering properties known as 437, 439 Market Street in the City and County of San Francisco; that said lease provided that the term should commence on the 15th day of September, 1943, and "extend for a period of six (6) months from and after the cessation of hostilities in the present war with Japan." That by the words "cessation of hostilities in the present war with Japan," it is alleged that plaintiff and defendant intended to refer to the "cessation of open and hostile warfare as accomplished by the surrender of Japan on August 14, 1945," as distinguished from a "Presidential or Congressional declaration of the end of the war, which event has not yet occurred and may not occur for some years in the future." It is further alleged that a dispute has arisen between the respective parties as to the construction of the provision of the lease.

Plaintiff seeks a declaration of his rights, and for a judgment of this Court "specifically declaring that hostilities in the present war with Japan ceased on August 14, 1945, and that said lease by its terms ended and terminated on February 14, 1946 * * *."

The defendant, by its answer, places in issue the material allegations of the complaint and sets forth affirmatively that the lease in question was prepared by plaintiff and under the circumstances the language in question should be construed strongly against plaintiff; that defendant has expended approximately \$30,000.00 in improvements and repairs; that, in effect, the construction of the lease

involves a consideration of war and post-war matters in a national, rather than purely local sense.

The case was tried on an agreed statement, amplified in unimportant particulars by testimony. The factual background is of no aid to the Court in determining the legal issue involved. The problem presented resolves itself into a question of law based upon the language employed.

Plaintiff, in effect, asks for a judicial declaration "that hostilities in the present war with Japan ceased on August 14, 1945 * * *." Thus far, there has been no formal proclamation of either the end of the war or of the cessation of hostilities. It is not for this Court to make such a declaration.

On September 2, 1945, the President of the United States, as part of his official proclamation said: "As President of the United States, I proclaim Sunday, September 2, 1945, to be V-J Day—the day of formal surrender by Japan. It is not yet the day for the formal proclamation of the end of the war or of the cessation of hostilities."

There has been no "cessation of hostilities" or "end" of the war or termination thereof, by proclamation of the President. Nor has there yet been a resolution by Congress.

Under date of September 1, 1945, and before the Proclamation referred to, Hon. Tom Clark, Attorney General of the United States, rendered an opinion to the President concerning the then status of emergency legislation relating to the wartime powers of the Executive. The opinion is quoted in part:

“First of all, it should be borne in mind that the war powers of the President and the Congress do not automatically cease upon the termination of actual fighting. As the Supreme Court said in *Stewart v. Kahn*, 11 Wall. 493, at 507: ‘(The war power) * * * is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.’ See also *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146.

“The broad basis of governmental power on which the various emergency and wartime statutes rest cannot, therefore, be said to have been terminated by recent developments, including the unconditional surrender of our enemies. Questions do arise at the present stage, however, with regard to the time which the Congress has specified in individual statutes as being the termination date of the powers therein conferred. As will appear in the attached compilation, certain of the wartime statutes are made effective only ‘in time of war,’ or ‘during the present war,’ or ‘for the duration of the war.’ Still other expressions may be found of similar character.

“Speaking generally, I believe that statutes of the type just mentioned should be considered as effective until a formal state of peace has been restored, unless some earlier termination

date is made effective by appropriate governmental action. In *Hamilton v. Kentucky Distilleries Co.*, *supra*, Mr. Justice Brandeis, speaking for the Court said: 'In the absence of specific provisions to the contrary, the period of war has been held to extend to the ratification of the treaty of peace or the proclamation of peace.' Again, in *Commercial Cable Co. v. Burleson*, 255 Fed. 99, 104, Judge Learned Hand rejected the contention that certain wartime powers conferred on the President in the First World War had terminated with the Armistice of November 11, 1918, and added: 'Even if I were to assume that the power were only co-extensive with a state of war, a state of war still existed. It is the treaty which terminates the war.' See also *Kahn v. Anderson*, 255 U. S. 1, 10; *Ware v. Hylton*, 3 Dall. 199, 236; 22 Op. A.G. 190 (1898). It is perhaps unnecessary to add that the Congress can at any time, in response to charged conditions, repeal or amend any wartime statute or group of statutes.

"I turn to another group of statutes: those which are to be terminated 'upon the cessation of hostilities, as proclaimed by the President.' Speaking once more in general terms, I believe that a provision of this type should be interpreted to refer to a formal proclamation, issued after you have determined that the facts warrant such action. Any less formal action on your part would not in my opinion be given by

the courts the legal effect of terminating a war-time statute, in the absence of proof in the document itself that it was your intention so to do. See *Hamilton v. Kentucky Distilleries Co.*, *supra*."

On September 6, 1945, the President of the United States, in his message to Congress reiterated—"The time has not yet arrived, however, for the proclamation of the cessation of hostilities, much less the termination of the war. Needless to say, such proclamations will be made as soon as circumstances permit."

Plaintiff would require this Court to re-write the provision of the lease in question, and do violence to the actual language employed. The record is barren of any evidentiary support with respect to the "intention of the parties" and, accordingly, the problem must be solved in the light of Executive and Legislative events.

Hostilities may well have been suspended on August 14, 1945, but did not cease, nor was there a cessation in the sense in which that term is used. *Commercial Cable Co. v. Burleson*, 255 Fed. 99, 104, 105; *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 40 St. Ct. 106.

Plaintiff places particular reliance upon *Kaiser v. Hopkins*, 6 Cal (2d) 537. In that case it appeared that the plaintiff petitioned the Superior Court for a writ of mandate to compel the defendant, Assessor of Los Angeles County, to grant him exemption from taxation in accordance with the provisions of

the State Constitution, wherein it is declared that "the property to the amount of \$1,000 of every resident of this state who has served in the army, navy, marine corps or revenue marine service of the United States in time of war and received an honorable discharge therefrom * * * shall be exempt from taxation." (Art. XIII, sec. 11¼). Plaintiff, it appeared, served in the United States Army from May 13, 1919, to May 12, 1922. The sole question for determination was whether a soldier who enlisted and served after the Armistice of November 11, 1918, is entitled to the exemption provided for those who served "in time of war." However, it appeared, the words "in time of war" were given legislative interpretation. In Section 3612 of the Political Code of the State of California it is provided—"The following are recognized as wars within the intent and meaning of said section of the constitution: * * * War with Germany-Austria, April 6, 1917, to and including November 11, 1918."

The Court therein concluded: "Where two constructions can be placed upon a constitutional amendment and the legislature has enacted a law placing a reasonable construction upon the amendment, the courts will ordinarily follow the legislative construction."

In the case at bar there has been no legislative determination, Congressional resolution or Presidential proclamation with respect to the termination of the war with Japan.

The Attorney General of the State of California on September 25, 1945, in Opinion 45/277, concluded

that "duration clauses in California statutes such as 'cessation of hostilities', 'termination of war', etc., are operative and the statutes are still in full effect until a proclamation by the Governor or by the President or a resolution of Congress or of the Legislature establishes the date of their termination or unless the Legislature amends or repeals them."

By parity of reasoning, the provision in the lease that the lessee, defendant herein, should hold the premises for "a term commencing on the fifteenth day of September, 1943, and extending a period of six (6) months from and after the cessation of hostilities in the present war with Japan, at the monthly rental of Four Hundred (\$400)" is operative and the said lease is still in full force and effect.

In view of the foregoing, there has been no termination of defendant's lease-hold interest, by operation of law, or efflux of time; the event, period, or time has not yet arrived when the term of six (6) months commences to run.

Findings may be prepared and judgment entered in favor of the defendant, United Seamen's Service, Inc., in accordance with the foregoing Opinion.

Dated: October 30, 1946.

GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed Oct. 30, 1946.

[Title of District Court and Cause.]

STIPULATION RE FINDINGS AND
ORDER THEREON

It Is Hereby Stipulated between respective counsel, that findings are waived as to the allegations of Paragraph VI of plaintiff's complaint.

Dated this 4th day of December, 1946.

/s/ THEODORE M. MONELL,
Attorney for Plaintiff.

J. J. DOYLE,
Attorney for Defendant.

Upon such stipulation: It is so ordered.

Dated this 5th day of December, 1946.

GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed Dec. 6, 1946.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause came on regularly for trial on the 5th day of August, 1946, before the Court, without a jury, a jury trial having been duly waived by plaintiff and defendant, and Theodore M. Monell, Esq., appearing as attorney for plaintiff and J. J. Doyle, Esq., appearing as attorney for defendant, and from the evidence introduced the Court finds the facts as follows:

I.

That defendant was and now is a non-profit organization, incorporated under the laws of the State of New York and authorized to do and doing business in the State of California and in the City and County of San Francisco in said state.

II.

That plaintiff was and now is the owner of that certain building generally known, numbered and designated as 437-439 Market Street in San Francisco.

III.

That on or about September 15, 1943, plaintiff, through her representatives, drew and submitted to defendant a written lease, which was executed, whereby and wherein plaintiff leased to defendant all of that certain store, together with the basement thereunder, generally known as 439 Market Street, together with the entire second and third floors of said building, the entrance thereto being generally known as 437 Market Street in San Francisco, being the premises hereinbefore mentioned.

That said lease provided that same should commence, "For a term commencing on the fifteenth day of September, 1943, and extending a period of six (6) months from and after the cessation of hostilities in the present war with Japan."

IV.

That the oral, evidentiary, factual evidence, with respect to the actual language employed, in support of the "intention of the parties," is of no aid to

the Court in determining the legal issue involved; that its construction and interpretation is a question of law.

V.

That neither the President of the United States by proclamation, nor the Congress by resolution, has declared either the cessation of hostilities or the termination of the war.

VI.

That said provision in said lease is operative; that defendant is entitled to hold said premises, "For a term commencing on the fifteenth day of September, 1943, and extending a period of six (6) months from and after the cessation of hostilities in the present war with Japan, at the monthly rental of Four Hundred Dollars (\$400.00);" that said lease is still in full force and effect; that there has been no termination of defendant's lease-hold interest by operation of law or efflux of time; the event, period, or time has not yet arrived when the term of six (6) months commences to run.

VII.

That defendant during its period of tenancy has expended in improvements and repairs as of March, 1946, the amount of Thirty Thousand Six Hundred Ninety-eight and 54/100 Dollars (\$30,698.54).

From the foregoing facts and as conclusions of law therefrom, it is held:

I.

"That there has been no cessation of hostilities or termination of the war.

II.

That said lease and the provisions thereof are operative; that defendant is entitled to hold said premises, "For a term commencing on the fifteenth day of September, 1943, and extending a period of six (6) months from and after the cessation of hostilities in the present war with Japan, at the monthly rental of Four Hundred Dollars (\$400.00);" that said lease is still in full force and effect; that there has been no termination of defendant's leasehold interest by operation of law or efflux of time; the event, period, or time has not yet arrived when the term of six (6) months commences to run.

III.

That defendant is entitled to judgment together with costs and disbursements expended or incurred herein.

Let judgment be entered accordingly.

Dated this 23rd day of December, 1946.

GEORGE B. HARRIS,

United States District Judge.

[Endorsed]: Filed Dec. 23, 1946.

In United States District Court, for the Northern
District of California, Southern Division

No. 26171G

B. SAMUELS,

Plaintiff,

vs.

UNITED SEAMEN'S SERVICE, INC., a non-
Profit Organization,

Defendant.

JUDGMENT

This cause came on regularly for trial on the 5th day of August, 1946 before the Court without a jury, a jury trial having been duly waived by the plaintiff and defendant; and Theodore M. Monell, Esq. appearing as attorney for plaintiff and J. J. Doyle, Esq. appearing as attorney for defendant; and the Court made and filed herein its opinion and its findings of fact and conclusions of law, each separately stated and in writing.

Now, therefore, by virtue of the findings of fact and conclusions of law

It Is Hereby Adjudged, Decreed and Ordered that that certain lease, drawn, submitted and executed on the 15th day of September, 1943 is operative.

It Is Further Adjudged, Decreed and Ordered that defendant is entitled to hold said premises, "For a term commencing on the fifteenth day of September 1943 and extending a period of six (6)

months from and after the cessation of hostilities in the present war with Japan, at the monthly rental of Four Hundred Dollars (\$400.00).''

It Is Further Adjudged, Decreed and Ordered that said lease is in full force and effect.

It Is Further Adjudged, Decreed and Ordered that there has been no termination of defendant's leasehold interest by operation of law or efflux of time; the event, period or time has not yet arrived when the term of six (6) months commences to run.

It Is Further Adjudged, Decreed and Ordered that defendant recover costs.

Done In Open Court This 23rd Day of December, 1946.

GEORGE B. HARRIS,
United States District Judge.

Approved as to form only.

THEODORE M. MONELL,
Attorney for Plaintiff.

J. J. DOYLE,
Attorney for Defendant.

[Endorsed]: Filed and entered Dec. 23, 1946.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73(b)

Notice Is Hereby Given that B. Samuels, the plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from

the final judgment entered in this action on December 23, 1946.

Dated: March 22, 1947.

/s/ THEODORE M. MONELL,
Attorney for Appellant
B. Samuels.

[Endorsed]: Filed Mar. 22, 1947.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the above entitled Court, and to
United Seamen's Service, Inc., Defendant and
Appellee in the above entitled matter, and to
J. J. Doyle, Esq., its attorney:

You and each of you will please take notice, and
you are hereby notified that the plaintiff and appel-
lant in the above entitled matter hereby designates
the following matters to be contained in the record
on appeal of said appellant in said matter, to-wit:

1. The judgment roll in said matter, includ-
ing the opinion of the District Judge therein;
2. The entire transcript of the testimony
taken upon the trial of said matter;
3. All exhibits introduced in evidence; and
4. This praecipe and service thereon.

Said transcript shall be prepared as required by
law and the rules of this Court, and be filed in the
office of the Clerk of the Circuit Court of Appeals

for the Ninth Circuit within the time required by law and the rules of this Court.

Dated: April 21, 1947.

/s/ THEODORE M. MONELL,
Attorney for Appellant.

The undersigned attorney for appellee in the above entitled matter hereby acknowledges service of the above praecipe this 21st day of April, 1947, and hereby consents that said appeal may be heard upon said transcript above designated.

Dated: April 21st, 1947.

/s/ J. J. DOYLE,
Attorney for Appellee.

[Endorsed]: Filed April 22, 1947.

[Title of District Court and Cause.]

ORDER ENLARGING TIME

Good cause appearing therefor, It Is Hereby Ordered that the time within which the Transcript of Record in the above matter must be filed with the Clerk of the Circuit Court of Appeals is hereby enlarged and extended to and including June 10, 1947.

Dated: May 1, 1947.

GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed May 1, 1947.

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 23 pages, numbered from 1 to 23, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of B. Samuels, Plaintiff, vs. United Seamen's Service, Inc., a non-profit organization, Defendant, No. 26171 G, as the same now remain on file and record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$3.10 and that said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 13th day of May, A. D. 1947.

[Seal]

C. W. CALBREATH,
Clerk.

/s/ M. E. VAN BUREN,
Deputy Clerk.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 26,171-G

B. SAMUELS,

Plaintiff,

vs.

UNITED SEAMEN'S SERVICE, INC.,

a non-profit organization,

Defendant.

Before: Honorable George B. Harris, Judge.

Monday, August 5, 1946, 2:00 o'clock p.m.

Appearances:

For the Plaintiff Theodore M. Monell, Esq.

For the Defendant: J. J. Doyle, Esq.

PROCEEDINGS

The Clerk: Samuels versus United Seamen's
Service.

Mr. Monell: Ready, Your Honor.

Mr. Doyle: Ready, Your Honor.

The Court: Counsel, will you state the appear-
ances for the record.

Mr. Monell: Theodore W. Monell, appearing for
the plaintiff.

Mr. Doyle: J. J. Doyle, representing defendant.

Mr. Monell: Has Your Honor had any oppor-
tunity to look at the pleadings?

The Court: Yes, I have.

Mr. Monell: You know, then, what the issues are?

The Court: You might state them generally.

Mr. Monell: This is an action for declaratory relief involving an interpretation of the clause in the lease which determines the expiration date thereof. I would say that is practically the only point in issue between the parties, because, whether the matters of difference which are attempted to be set up are material or not, I would be willing to stipulate as to the facts upon Mr. Doyle's assurance they are facts.

It is our contention, which Your Honor has probably gathered from reading the pleadings, that the lease specifically provides it commences on the 15th day of September, 1943, and extending to a period of six months from cessation [2*] of hostilities, and that the lease terminated six months therefore, from and after August 14, 1945, which was V-J Day.

As part of our proof, I would like to offer in evidence the original lease, dated September 15, 1943, by B. Samuels, the plaintiff in this action, to United Seamen's Service, Incorporated, a non-profit organization, in the State of New York, executed between lessor and lessee, and with the corporate seal impressed. I ask that be admitted as Plaintiff's Exhibit No. 1.

The Court: Any objection?

Mr. Doyle: No objection.

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: Very well, the lease may be admitted in evidence as Plaintiff's Exhibit 1.

(The lease referred to was marked Plaintiff's Exhibit No. 1.)

Mr. Monell: I should like also to read in evidence the Proclamation of the President of the United States, dated August 18, 1945, in which he states:

"The war lords of Japan and the Japanese armed forces have surrendered. They have surrendered unconditionally. Three months after victory in Europe, victory has come in the East.

"The cruel war of aggression which Japan started eight years ago to spread the forces of evil over the Pacific has resulted in her total defeat. [3]

"This is the end of the grandiose schemes of the dictators to enslave the peoples of the world, destroy their civilization, and institute a new era of darkness and degradation. This day is a new beginning in the history of freedom on this earth.

"Our global victory has come from the courage and stamina and spirit of free men and women united in determination to fight.

"It has come from the massive strength of arms and materials created by peace-loving peoples who knew that unless they won, decency in the world would end.

"It has come from millions of peaceful citizens all over the world—turned soldiers almost

over night—who showed a ruthless enemy that they were not afraid to fight and to die, and that they knew how to win.

“It has come with the help of God, who was with us in the early days of adversity and disaster, and who has now brought us this glorious day of triumph.

“Let us give thanks to Him, and remember that we have now dedicated ourselves to follow in his ways to a lasting and just peace and to a better world.

“Now, Therefore, I, Harry S. Truman, President of the United States of America, do hereby appoint Sunday, August 19, 1945, to be a day of prayer.

“I call upon the people of the United States, of all [4] faiths, to unite in offering their thanks to God for the victory we have won, and in praying that He will support and guide us into the paths of peace.

“I also call upon my countrymen to dedicate this day of prayer to the memory of those who have given their lives to make possible our victory.

“In Witness Whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

“Done at the City of Washington this 16th day of Aug., in the year of our Lord nineteen hundred and forty-five, and of the Independence

of the United States of America the one hundred and seventieth.

[Seal] HARRY S. TRUMAN.

By the President: James F. Byrnes, Secretary of State.

(F. R. Doc. 45-15120; filed Aug. 17, 1945, 11:25 A.M.)”

The Court: Have you that excerpt?

Mr. Monell: I have a typewritten copy.

The Court: Have you any objection to that being incorporated? I should like to have it in the record.

Mr. Monell: I think, as a matter of law, Your Honor would probably take judicial notice under Section 1875 of the Code of Civil Procedure, inasmuch as it is a public and private act of the Executive Department of the Government, and the public and private acts of the Executive, Legislative and [5] Judicial Departments of this State and the United States of America, the courts take judicial notice of pursuant to that section. That is Subdivision 301875.

Mr. Doyle: I see that the document has been identified, and in response to Your Honor's question, may I, through Your Honor, ask Counsel a question?

The Court: Yes.

Mr. Doyle: Do you contend, Mr. Monell, that the document from which you have just read is merely a victory proclamation, or do you contend that this is the termination or cessation of hostilities between the peoples of Japan and this country?

Mr. Monell: I contend this is a statement of the President of the United States of America as to the ending of a war as of a prior date.

Mr. Doyle: To which we object as incompetent, irrelevant and immaterial, not binding on the Court, and not determinative of the issues. We still maintain our Armed Forces in Japan.

The Court: I will allow the proclamation to go into evidence.

(The proclamation referred to was marked Plaintiff's Exhibit No. 2.)

Mr. Monell: I also wish to read the statement of President Truman on August 14, which was, in fact, V-J Day. This was the text of the President's statement: [6]

"I have received this afternoon a message from the Japanese Government accepting unconditional surrender and the Allied forces have been ordered to cease firing.

"I deem this reply a full acceptance of the Potsdam Declaration which specified the unconditional surrender of Japan."

On the same date, August 14, 1946, Secretary of State Byrnes addressed this message to the Swiss legation in Washington, D. C.:

"I have the honor to inform you that the President of the United States has directed that the following message be sent to you for transmission to the Japanese Government"— [7]

The Court: May I ask what you are reading from?

Mr. Monell: I am reading from the San Francisco Chronicle of August 15, 1945.

The Court: Have you any means of determining the authenticity of the statement?

Mr. Monell: This is a copy of the President's statement, the text of his statement, and also of Secretary Byrnes' statement, if the Court please. I haven't the index to the official reports, but——

The Court: May I ask Counsel whether or not a stipulation may be entered into with respect to the text of these several proclamations emanating from the President of the United States? Otherwise, some means must be provided for this Court to have authenticated copies.

Mr. Doyle: Yes, Your Honor.

The Court: I had thought that you gentlemen had virtually stipulated to the salient or essential facts in the case, and the matter before the Court would be one of law and interpretation of those facts. However, if there be divergent views on the facts, we should know at this stage.

Mr. Doyle: Your Honor, I did not want to interrupt Counsel, but Your Honor asked Counsel for an opening statement on the matter, and as I understand Counsel's presentation, it includes not only his views, but also an offer of evidence.

The Court: My intention was to have you give me a [8] narrative, generally of the issues involved and of the evidentiary matters to be presented, and you would proceed accordingly. The lease I accepted in evidence because I assume that is the basic document.

Mr. Monell: I was merely resting on these declarations of the President and the declaration by Acting Governor Howser on August 14, and the declaration of V-J Day, and was going to rest on that, because I think it is a matter of the construction of the language of the document in line with these other statements made by the Executive Officers of the State and of the Country.

Mr. Doyle: I have no objection to the document you have heretofore referred to. I see there is a seal on it. It is designated "A Victory Proclamation." I have no objection to that for what it is worth, but as to the newspaper article, I cannot go along with that.

Mr. Monell: Are you objecting to the presidential statement of August 14?

Mr. Doyle: Yes, I don't think it is determinative of the issues here.

The Court: Have you completed the general outline of what you expect to prove in this case?

Mr. Monell: That is correct, Your Honor.

The Court: So far as the legal issues and admissibility, it is my recollection there were several Los Angeles cases, [9] and I don't know whether you are going to refer to them in this case, but we will meet the legal issues at the proper time, but I want to clarify all factual matters.

Mr. Doyle, have you any statement to make at this time?

Mr. Doyle: Yes, Your Honor, insofar as the defendant is concerned, we propose to establish by

evidence the circumstances surrounding the execution of the lease on September 15, 1943, upon which is based the present controversy. We expect to establish by competent evidence that the lease on this, to be introduced was prepared by the lessor and the plaintiff in this instant action, or, more correctly, the plaintiff's agents in this instant action.

We expect to prove to Your Honor the background, the past, the present and the future, of the inception, the continuance up to the present time and in the future of the defendant corporation. The fact we expect to prove is that it is a charitable or a non-profit organization.

We expect to prove, in view of the lease executed here, that the defendant corporation has expended in excess of \$30,000, depending upon the facts involved and the length of the war, the post-war situation, and the fact that the defendant corporation initially was formed at the instance and at the request of the United States Maritime Commission, the War Shipping Administration, and the funds therefor came initially from those agencies and from the employers and from [10] the unions, themselves, for the purpose of providing some place, not only for the merchant seamen during the war, but after the war, and that the need of the merchant seamen at the present time continues; and at no time was it intended by the defendant corporation that the yardstick for the measuring pertained to the signing of the surrender on board the USS Missouri.

We do not believe that the date began to run from the signing of the surrender on board the Missouri

at all. We expect to show after that evidence is in, from the history of post-war situations, from the Civil War and World War I, that the question of the end of the war, or, using the exact words involved in this litigation, the matter of the cessation of hostilities is a political and governmental act to be determined by the respective powers themselves, and not to be interpreted by the courts. And, upon the facts and the evidence we expect to ask for a judgment.

The authors we will submit to Your Honor are very clear on the proposition that one country is occupied by the forces of another country, that that is still a question of hostilities.

The Court: Reference might be made to the case you have on this matter.

Mr. Monell: The California case is *Kaiser versus Hopkins*, in 6 Cal. 2d, 537. That was an action by a veteran [11] to obtain the exception of \$1,000 to which veterans were entitled under the Taxing Statutes. The particular veteran had served in the Army from May 12, 1919 to 1922. The Armistice was signed on November 11, 1918, but Congress did not declare the war over until 1921, and the Supreme Court, in banc, adopted the opinion of Mr. Justice Wood, who wrote the opinion in the District Court of Appeal, because that opinion contained a correct statement of the law.

It was stated in that case:

“When the armistice was effected on November 11, 1918, the conflict between the United States and Germany-Austria came to an end.

All the war activities ceased, never to be renewed. It is true, as argued by plaintiff, that we were technically at war until July 2, 1921, during which time the peace commissioners negotiated the final terms of settlement, but in the minds of the people the war was over. A spirit of rejoicing swept the land, business cares were laid aside, people danced in the street and engaged in numerous impromptu celebrations. The young men of the nation were recalled from war, from the battlefields where their lives had been endangered. In commemoration of the ending of the great war the day of the armistice was established as a legal holiday. When at a later date the people, in appreciation of the great sacrifices made by the soldiers [12] in leaving their homes and occupations to suffer the privations and dangers of war, amended the Constitution to grant them certain tax exemptions, they doubtless did so to reward those who served in time of actual war and not those who served in time of actual peace, to reward war service and not peace service. Application of the rules above set forth to the present situation leads to the inevitable conclusion that the voters used the words in question in their 'ordinary and common acceptance', and that they intended to exempt those only who had served during the period of actual conflict."

In this case there was a Political Code provision which defined the terms of war from April 6, 1917,

to and including November 11, 1918, but the opinion was not based solely on the Political Code. It was based solely on the terms of war.

The Mississippi case is not based on any statutory period for the purpose of the exemption statute. It was an identical proposition, the case being cited in 172 N.E. 218.

I would also like to introduce in evidence——

The Court: Counsel, first, are there any stipulations that may be entered into? I think I have the factual background fairly well in mind.

Mr. Doyle: The lease in question was prepared——

Mr. Monell: By myself. [13]

Mr. Doyle: I am not prepared to go that far, Mr. Monell.

The Court: I asked you for any stipulation. If we cannot get them by stipulation, we will have to take evidence.

Mr. Monell: Will you stipulate August 14 was V-J Day, at which time the shooting was stopped?

Mr. Doyle: I will stipulate on August 14, 1945, a surrender document was executed on board the USS Missouri by the representatives of the then Empire of Japan and the United States of America.

Mr. Monell: That is not the fact. It was signed on September 1. August 14 is when the shooting stopped, and that is when the celebrations were had. That is when the orders of "cease fire" were given by the Navy.

The Court: Is that the day referred to in the proclamation?

Mr. Monell: No, this day is the day of prayer.

Mr. Doyle: Mr. Monell, the Court asked for a stipulation, and I will stipulate the lease, which you propose or eventually will introduce in evidence, was prepared and sent to the defendant corporation for signature, but it was your lease and the defendant corporation executed the lease.

Mr. Monell: Will you also stipulate as to August 14 being V-J Day?

The Court: Do you enter into that stipulation?

Mr. Doyle: Yes, I accept that. [14]

The Court: We are going along swimmingly, Counsel. We have been here 25 minutes with one stipulation.

Mr. Monell: Will you stipulate August 14 was V-J Day at which time Naval officers gave the orders to "cease fire"?

Mr. Doyle: So stipulated.

Mr. Monell: Will you also stipulate that on September 1st, 1945, on board the USS Missouri, the formal document of surrender was executed between the then Empire of Japan and the United States of America?

Mr. Doyle: A formal document of surrender was executed—so stipulated.

Mr. Monell: That's all. Plaintiff will rest on those stipulations. For the purpose of cutting short the defense, I will stipulate—

The Court: Counsel, have you any testimony to offer?

Mr. Monell: No, the stipulations are sufficient. The plaintiff will rest.

Mr. Doyle: Do I take it now that you desire——

The Court: Counsel, I don't want any misconception of the record, or misinterpretation of any matters had under discussion. Objection was made to the reading of the newspaper article on the ground that it was hearsay. There is a stipulation covering the subject-matter you were seeking to elicit through the medium of the newspaper article.

Mr. Monell: That is correct. [15]

The Court: There was no objection to the proclamation you proposed to offer.

Mr. Monell: That is correct.

The Court: Therefore, a copy of the declaration may be received for the Court's benefit.

Mr. Doyle: You mean the newspaper copy?

Mr. Monell: No, the other.

Mr. Doyle: If Your Honor please, I desire to make the objection that the document introduced in evidence as part of the plaintiff's case, apparently, first in order, is merely a Victory Proclamation, is in no way determinative of the issues in the case, and is not binding on any of the defendants involved, and I object upon the further ground it is incompetent, irrelevant and immaterial.

The Court: I will allow it in evidence. You read it in evidence.

Mr. Monell: Yes, I read it in evidence. Plaintiff will rest.

The Court: Ultimately, Mr. Doyle, it is a question of interpretation, is it not?

Mr. Doyle: Yes.

The Court: The plaintiff rests?

Mr. Monell: That's right.

(Plaintiff rests.)

Mr. Doyle: At this time the defendant will, therefore, [16] move for a judgment of dismissal upon the following grounds:

On the stipulations heretofore entered into, they are incompetent, irrelevant and immaterial insofar as they concern the real point in issue. They are not determinative of the issues involved, and they are not binding on the corporation defendant.

Next, plaintiff's complaint, in which he seeks this declaratory relief judgment, particularly Paragraph IV, page 2, commencing line 15, is not proved under the stipulations entered into as part of plaintiff's complaint at all. There has been no stipulation and no evidence by stipulation, or otherwise, that any of the allegations of plaintiff's complaint have been proved by any testimony or evidence whatsoever.

(Thereupon the motion for judgment of acquittal was argued by the respective parties.)

Mr. Doyle: I will submit the motion, Your Honor.

The Court: Motion denied.

Mr. Monell: I might suggest, if Counsel would make an offer of proof, I might stipulate, to save time.

Mr. Doyle: All right. The defendant offers to

prove on or about September 15, 1943, the two individuals who were involved in the initial transaction involved subsequent to the execution of this lease, were Mr. Vincent Fallon and Mr. Don Fazackerley, and that gentleman at that time was the [17] Port Area Executive, and upon instruction of the defendant corporation, sites were checked in San Francisco that might be utilized for the occupancy of such a program for the United Seamen's Service that was formed to aid, and for the benefit, of merchant seamen;

That eventually the premises in question were found to be adaptable, and that thereafter, Mr. Fallon contacted Mr. Milton Meyer, and made known to him the fact that they were interested in a lease, and that either the plaintiff—I might say the plaintiff is B. Samuels, and Mr. Meyer is a real estate broker—that neither the plaintiff nor Mr. Milton Meyer prepared a lease and submitted it;

That Mr. Fallon was merely a Port Area Executive and had no experience in legal matters. The matter was referred to New York, the headquarters of the national organization, where the lease was signed and returned;

That the United Seamen's Service organization, as was pointed out to Mr. Meyer, was formed at the behest of the United States Maritime Commission and the War Shipping Administration for the specific and direct purpose of providing accommodations, and by that I mean lodging, meeting place and recreation halls in providing more or less of a social service program to merchant seamen;

That at that time it was known by Mr. Fazackerley that the United Seamen's Service, being formed at the behest of [18] the two organizations suggested by and contributed to by the unions in a very large measure, that the organization was to continue as long as there was a need for it, and the Union goes along with, and is practically in adjunct of, the United States Maritime Commission and War Shipping Administration;

That it was known at that time that the mere fact that this Country was agitating for an unconditional surrender by Japan——

The Court: When?

Mr. Doyle: Ever since the beginning of the war—and at the time the lease was executed that this Country would insist on an unconditional surrender with Japan, and also the fact that their program and services would have to continue in view of the large number of merchant ships and employees on those ships as long as there was a need for it, the need to be directed or suggested by War Shipping Administration, and the lease was signed and executed and sent in, and at no time did Mr. Meyer suggest to Mr. Fazackerley or Mr. Fallon, either directly or indirectly, in any manner, shape or form, that the six months mentioned in the lease was to be measured by what developed to be the signing of the surrender on the Missouri;

And that it was intended to keep these services as long as there was a need for the services, and there was no need either directly or indirectly to

measure the time that United [20] Seamen's Service should vacate or give up the lease.

There was another phase involved in this also, Your Honor, and that is this: That USS receiving those funds from public subscription and public contributions——

The Court: For the record, USS is United Seamen's Service.

Mr. Doyle: USS is the United Seamen's Service. As I say, receiving its funds from public subscriptions and public contributions, they could not under its policy, or they would not have contributed the amount that they did to improve and to maintain and to better this building in excess of \$30,000 if they knew there was going to be such a construction as now is insisted on by the plaintiff.

All these facts we will be able to prove.

Mr. Monell: I will stipulate to all but the question of the knowledge on the part of the plaintiff that the lease was to endure so long as there was any necessity for the United Seamen's Service, because we rest on the terms of the lease in that regard.

The Court: You may withdraw that.

Mr. Doyle: We will withdraw that and put a witness on.

Mr. Monell: Counsel stated that Mr. Fazackerley understood certain things. That would not be binding on the plaintiff, because his understanding as to the necessity for the United Seamen's Service was not within our information. [21] As to that, I could not stipulate, but as to the background of the

organization I am willing to stipulate, because I think it is immaterial for any consideration by the Court.

Mr. Doyle: Then the stipulation is accepted.

The Court: It is accepted by the Court. I think you gentlemen have accomplished a great deal in saving time.

Mr. Monell: I don't want to stipulate to the matter of the investment of defendant as being in consideration of any agreement on the part of plaintiff that there would be any extension of the lease beyond the stated term.

The Court: Very well. Call your first witness.

DON FAZACKERLEY

called on behalf of Defendant; sworn.

The Clerk: Q. Will you state your name to the Court. A. Don Fazackerley.

Direct Examination

Mr. Doyle:

Q. Your address, Mr. Fazackerley, please.

A. 1871 Mission Street, San Francisco.

Q. Mr. Fazackerley, do you know something about the United Seamen's Service, the defendant in this action?

A. I know a great deal about it, Mr. Doyle.

Q. When did you first become acquainted with the defendant corporation?

A. As I recall, it was in October, 1942.

Q. What was your connection with the defendant corporation at that time?

(Testimony of Don Fazackerley.)

A. Well, through several years prior to [22] that time I had an interest in the broad question of Merchant Seamen Welfare, and was approached by, first, the employee of United Seamen's Service who was assigned to this coast area, Mr. Philip Ketcham, in 1942, to develop a program for San Francisco, to develop a program for San Francisco, it being known at that time that this would be one of the principal war ports, and, in fact, had already become so. The merchant shipping was tremendously active at that time.

Q. Upon being so approached, did you accept?

A. I did, and proceeded to create an advisory committee, a lay body to get such a program under way, and soon after that it became quite obvious that we had to have professional help, and Mr. Fallon was then hired on a full-time basis to serve as the Port Area Executive.

Q. What did your committee consist of—briefly—I don't mean the names, but the class of men?

A. They were primarily representatives of shipping concerns, of maritime labor unions and of the Government agencies related to shipping, the WSA, the Maritime Commission, the Public Health Service, and then, a comparatively small number of people like myself who were just generally interested in the question.

Q. Did you subsequently confer with and assume an official capacity?

A. Yes, I did, I became first the Vice-Chairman

(Testimony of Don Fazackerley.)

of the committee, and later the Chairman, succeeding [23] Mr. Jerd Sullivan.

Q. When did you become Vice-Chairman of the committee?

A. I would say probably, April or May of 1943.

Q. Then, when did you become Chairman succeeding Mr. Sullivan?

A. Probably May of 1944.

Q. And as Vice-Chairman, what were your duties with USS?

A. Well, because Mr. Sullivan was a pretty busy fellow, I carried the ball for him in the administrative phase of the activity.

Q. Was the question of the type and length of services the defendant corporation was to render, and the length of time they were to be rendered, under discussion prior to the time there was any lease executed in connection with the premises in question?

A. No, there was no discussion that I am aware of.

Q. Are you familiar with the purposes and the policy of the defendant corporation as to continuance of its operation after it had been established?

Mr. Monell: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. My understanding of the position of the United Seamen's Service was to perform such service for seamen as would be consistent with the need here in San Francisco, and that is about as far as

(Testimony of Don Fazackerley.)

it went. There had been no determinations or [24] time—even yet.

Q. (By Mr. Doyle): You are limiting——

Mr. Monell: I move to strike the witness' answer, following the words "My understanding."

The Court: That may go out.

Q. (By Mr. Doyle): What policy was determined by the governing committee of the defendant corporation as to the services and need of services, and the length or extension of services?

Mr. Monell: I object to this line of testimony as incompetent, irrelevant and immaterial. It is not admissible.

The Court: Objection sustained.

Q. (By Mr. Doyle): Is there presently a need for the operation of the defendant corporation?

Mr. Monell: Same objection.

The Court: Sustained. I think you covered part of this in your stipulation and offer of proof.

Mr. Doyle: Yes, your Honor.

The Court: This is repetitious, and I take it, on the offer of proof you had no objection to the necessity or need that the organization continue, Counsel.

Mr. Monell: As I say, excepting there was no agreement; it was no part of the agreement between the parties.

Q. (By Mr. Doyle): Was there anything ever communicated to you by anybody about the alleged termination date of this lease? [25]

A. No.

(Testimony of Don Fazackerley.)

Q. When was the first time that that subject arose?

A. Well, it arose early in this year when the question was raised by the combination of our Port Area Executive and this broker handling the property, Mr. Milton Meyer, and at that time statement was made that our lease, being no longer operative, and that a substantially larger rental could be obtained for the premises, we should make some plans to vacate. That was quite serious because the activity was continuing in war-related services.

Mr. Monell: I ask the last part of the witness' answer go out as to the nature of the activities.

The Court: The last part of the answer may go out.

Q. (By Mr. Doyle): So, then, you were on the premises from the effective date of this lease, and you have received no indication that the plaintiff or his agents desire that you vacate the premises before that date, is that correct?

Mr. Monell: May I have that question? I didn't understand it.

The Court: Read the question.

(Question read.)

A. Yes.

Q. (By Mr. Doyle): Do you know of your own knowledge whether it was ever contended at any time as to when the termination date should commence to run on this lease? [26]

(Testimony of Don Fazackerley.)

A. I don't understand your question, Mr. Doyle.

Q. Did you ever receive any statement or suggestion or inference from the lessor, the plaintiff's in this case, as to when——

The Court: The word "inference" may go out.

Mr. Doyle: Q. As to when the effective day of the termination of this lease was to begin to run.

A. No.

Mr. Doyle: No further questions.

Cross Examination

By Mr. Monell:

Q. Mr. Fazackerley, were you connected with United Seamen's Service at the time of the execution of this lease? A. Yes, I was.

Q. Did you have any negotiations with Mr. Meyer? A. Not directly.

Q. Did you have any discussion as to the rental, or any discussion at all as to the ending of the lease? A. No, I did not.

Q. Did you send the lease east, yourself?

A. No. Mr. Fallon of the staff of the United Seamen's Service did.

Q. Did you see the lease yourself?

A. I am quite sure I did.

Q. Was there any discussion about the length, as to cessation, or, rather, six months after cessation of hostilities in the [27] present war? Do you recall having any discussion with Mr. Meyer about that at all? A. No.

Q. There was no discussion at all? A. No.

(Testimony of Don Fazackerley.)

The Court: Q. Do you have counsel in the east? A. Yes.

Q. Lawyers?

A. Yes, we had a firm of attorneys.

Q. Do you recall the names of the lawyers?

A. I am sorry, I don't. Mr. Doyle might recall, because he was in touch with them.

Q. And the lease was forwarded to these lawyers?

A. The lease was forwarded to these lawyers, through the national headquarters of the United Seamen's Service. They turned it over to the attorneys.

Mr. Monell: Q. You don't know of your own knowledge they turned it over? It is hearsay?

A. Their statement was that they did.

Mr. Monell: I will take that as a fact.

That's all.

Mr. Doyle: That's all.

VINCENT MEHERN FALLON

called for the defendant, sworn.

The Clerk: Q. Please state your name to the Court. A. Vincent Mehern Fallon.

Direct Examination

By Mr. Doyle:

Q. What is your address, Mr. Fallon? [28]

A. 458 - 20th Avenue.

Q. You were formerly employed by the defendant corporation? A. Yes.

(Testimony of Vincent Mehern Fallon.)

Q. Can you tell us now about when it was that you were first so employed?

A. In March of 1943.

Q. Are you the gentleman who originally was thrown in contact with, or contacted Mr. Meyer about the premises now involved?

A. That's right.

Q. And the premises were checked by your organization and by you, is that correct?

A. Yes, although I was assisted in that with Mr. Philip Ketcham, the then Regional Director.

Q. Mr. Ketcham is no longer with the defendant corporation.

A. I am not sure—I don't know.

Q. Did you or your organization finally suggest to Mr. Meyer the preparation of the lease?

A. Yes, I think so. I think that is true.

Q. Did you subsequently receive a lease from Mr. Meyer? A. Yes.

Mr. Doyle: It is stipulated that is the lease in evidence, Mr. Monell?

Mr. Monell: So stipulated. A.

Mr. Doyle: Q. I take it you had your hands full at that time with the numerous details you were taking care of in San Francisco. [29]

A. That's correct.

Q. Did you, pursuant to the routine that existed at that time, this being a legal matter, refer the matter to the national office of the defendant corporation? A. Yes, sir.

(Testimony of Vincent Mehern Fallon.)

Q. Where is that national office?

A. 39 Broadway, New York.

Q. And the lease was referred to your national office in New York City for execution?

A. That's correct.

Q. And it was returned? A. Yes.

Q. Eventually it was, with changes?

A. Yes.

Q. And you, in turn, returned the original to Mr. Meyer, is that correct? A. Yes.

Q. During the time of any negotiations leading up to, and finally resulting in the execution of the lease in question—well, give us the conversation that you had with Mr. Meyer, if any, about his idea of the use of the words and what they meant, "Cessation of hostilities of the present war with Japan".

A. I am a little bit confused by your question, Mr. Doyle.

Q. Let me split it up, then: You had a number of conferences with Mr. Meyer?

A. Yes, several.

Q. And it was finally determined over some period that these premises were somewhat suited to the purposes of the defendant corporation?

A. That's right.

Q. It was finally determined to lease, is that correct? [30]

A. Yes, most of those conversations were as to what the owner was going to do, and helping to rehabilitate the property.

(Testimony of Vincent Mehern Fallon.)

Q. Did the subject of rehabilitating the property come up? A. Yes.

Q. Do you know of your own knowledge that the defendant corporation did rehabilitate this property? A. Yes.

Q. When you had your various conversations with Mr. Meyer about the length of time that the defendant corporation wanted these premises, did he ever tell you what he had in mind, or what he meant by "Cessation of hostilities in the present war with Japan", or did he ever tell you when they wished to consider, or would consider the date for the running of six months period of time?

A. No, I don't think he ever made a definite statement one way or the other. We thought of it in terms of the end of the war, and that is all either of us thought of, so far as I can recall. I know, for my part that is what I thought.

Q. Did Mr. Meyer ever discuss with you the use of the words "Cessation of hostilities in the present war with Japan"? Did he differentiate between an armistice or a peace treaty and the end of the shooting war?

A. No, there was no differentiation made.

Q. The subject was not covered with you at all, is that correct? A. Yes.

Mr. Doyle: Take the witness. [31]

(Testimony of Vincent Mehern Fallon.)

Cross Examination

By Mr. Monell:

Q. You say it was not for the end of the war: What do you think is the end of the war?

Mr. Doyle: I object to that.

The Court: Objection overruled.

Mr. Doyle: Withdraw the objection.

A. We used a terminology, I suppose you could call it, which, as I remember, was "Duration plus six months", and that to me meant the same as it meant to everybody else.

Mr. Monell: Six months after August 14?

A. No, I cannot say.

Q. From when?

A. Just "Duration plus six months".

Q. What does "Duration" mean?

A. Well, I don't know. I never thought of it. I, first of all, was entirely too busy trying to get my job done than thinking about the end of the war.

Q. There was no actual discussion between you and Mr. Meyer about when the lease would end?

A. No.

Q. Your testimony brought to mind something here: This lease was originally prepared and sent back by you and changed by the New York office, wasn't it? A. That is true.

Q. Do you recall what the change consisted of?

The Court: Have you the lease, Counsel? Show the gentleman the lease in question.

Mr. Monell: Pardon me. [32]

(Testimony of Vincent Mehern Fallon.)

Q. This is the executed lease—it may be stipulated to by Mr. Doyle—do you recall what the changes were that New York insisted on?

A. No, I don't. The lease, I recall was a different colored lease than this, and it had several clauses on white paper that showed up on the blue, you see, and they were stapled on.

Q. This is the Meyer form of lease. Was the other lease like this?

A. The other was a blue form, it seems to me, but they sent it back and requested those changes to be initialed and returned to them.

The Court: At this time we will take the afternoon recess.

(Recess.)

Mr. Monell: Q. Mr. Fallon, during the recess you checked certain papers I showed you that made you recall there was a prior lease, but you don't know the reason for the change in that lease?

A. That's right.

Q. And the lease introduced in evidence was changed in accordance with the agreement of modification suggested by the home office, is that true?

A. That's right, I didn't pay much attention to it. It was sent back east to national headquarters who had legal advice.

Mr. Monell: That is all. [33]

Redirect Examination

By Mr. Doyle:

Q. Mr. Fallon, Mr. Monell asked you about

(Testimony of Vincent Mehern Fallon.)

your idea of the end of the war: when the lease was received in the San Francisco office and forwarded by you to New York to make any changes or express any views about the lease, or otherwise, did the national representatives make any inquiry as to the meaning of the end of the war?

A. I believe I used the term earlier "Duration plus six months". That was the common phraseology we used all the time, and in sending the lease back, I said, "Here is the lease and accompanying papers and estimates of construction work," and so forth. The lease issued was for the duration plus six months.

Q. Actually, those words were not used either in the lease or in any document that came back from New York? A. No.

Q. Did you attempt to be of any assistance or enlighten the New York office, or make any suggestion about the common acceptance of the end of the war, as to when the period should run?

A. No, I didn't think about it.

Q. In other words, very bluntly, that was none of your business? A. That's it.

Q. And you had your hands full of other details? A. That's right.

Mr. Doyle: That's all.

The Court: Does the record show the official capacity [34] of these gentlemen with respect to the defendant, United Seamen's Service?

Mr. Monell: He was the Port Area Executive.

(Testimony of Vincent Mehern Fallon.)

The Court: Q. What did those duties entail?

A. They entailed the over-all administration of welfare and social service programs for merchant seamen.

The Court: May the record show the actual time of occupancy prior to August 14, 1945.

Mr. Monell: The lease started September 15, 1943.

Q. Were you in possession at that time, do you know, Mr. Fallon?

A. As near as I can gather, we didn't enter the building until January 1944.

Q. Were you making improvements to the building at the time?

A. Yes, heater and fire escape, and so forth.

Q. Did you pay rent on September 15 according to the terms of the lease?

A. That I am not sure. I think there was an agreement, but it was between our New York office and the owner of the building regarding the rent that would be charged if we did not get it at a certain time. It was told to me—to be fair to both sides—I am not sure of it exactly.

Mr. Monell: That's all.

Redirect Examination

By Mr. Doyle:

Q. What was the condition of the building when USS, the defendant corporation, finally decided to lease?

A. It was horrible. [35]

(Testimony of Vincent Mehern Fallon.)

Q. And were considerable improvements necessary? A. Yes, indeed.

Q. And you constructed a fire escape?

A. Yes.

Q. And when I say "You," you had the fire escape installed? A. That's right.

Q. On the exterior of the building?

A. That's right.

Q. You had a heating plant in the building installed?

A. We had to purchase new equipment—three new heaters.

Q. That was purchased and installed?

A. Yes.

Q. And upon the lease, it was up to you people to make these installments?

A. There was an agreement between the owner and ourselves that they would stand the liability in part for some of it.

Q. Who stood for the other part?

A. We did.

Q. The defendant corporation?

A. That's right.

Mr. Doyle: No further questions.

Mr. Monell: No questions.

The Court: The record reveals the fact that the gentleman on the stand did not have any conversation with Mr. Meyer who appears to have represented the owners.

Mr. Monell: He did have a conversation with Meyer.

(Testimony of Vincent Mehern Fallon.)

The Court: But he did not have any conversation concerning the subject of the inquiry.

Mr. Doyle: I think there is a little bit more than that. There was no conversation with Mr. Meyer as to what he, Mr. [36] Meyer, had in mind, or what this gentleman had in mind as to the terminology or use of the language in the lease prepared by the plaintiff.

Mr. Monell: You will stipulate the plaintiff, Mr. Samuels, never appeared or saw anyone connected with the defendant in this matter, that the defendants dealt with Mr. Meyer.

Mr. Doyle: If you tell me that.

Mr. Monell: So stipulated.

MELVIN PHILBRICK,

called as a witness for the defendant, sworn.

The Clerk: Will you state your name to the Court? A. Melvin Philbrick.

Direct Examination

By Mr. Doyle:

Q. Your residence, Mr. Philbrick?

A. 1449 7th Avenue, Oakland.

Q. Your occupation?

A. Port Executive, United Seamen's Service.

Q. You succeeded the previous witness in that capacity? A. That is true.

Q. When did you assume those duties?

A. September 14, 1944.

(Testimony of Melvin Philbrick.)

Q. And you are presently active as such?

A. That's true.

Q. Mr. Philbrick, during the time that you have been so acting in connection with the defendant corporation's business, have you met Mr. Meyer?

A. Oh, yes. [37]

Q. On numerous occasions?

A. No, several.

Q. Did you have any conversation with Mr. Meyer about the terminology presently being debated in this court?

Mr. Monell: I object to that as incompetent, irrelevant and immaterial. This is 1944, and the lease was entered into in 1943.

The Court: When are you applying these conversations?

Mr. Doyle: I want to find out as many as they had.

The Court: When?

Q. (By Mr. Doyle): When did you have these conversations?

A. General conversations, you mean?

Q. Yes, sir.

A. On several occasions when the plumbing went bad, or certain aspects of the building maintenance were in question which we felt that the landlord was at least partially responsible, we talked to Mr. Meyer. He came over on several occasions and he pointed out these various things.

(Testimony of Melvin Philbrick.)

Q. These conversations would be prior to your assuming the position as Port Executive?

A. That is true.

Q. When did you assume that position?

A. September 19, 1944.

Q. From that time did you have any conversation with Mr. Meyer about what it was intended these words were to mean, or what they were intended to convey?

Mr. Monell: Same objection.

The Court: I will sustain the objection.

Mr. Doyle: It is acquiescence, your Honor. [38]

Mr. Monell: Mr. Doyle, all you want to show is that there was no discussion as to the date?

Mr. Doyle: Yes.

Mr. Monell: I will stipulate there was no discussion until some time early in this year. We contend the lease expired six months after August, 1945, and there was no discussion about the period by either party.

Q. (By Mr. Doyle): When did you have a discussion this year with Mr. Meyer about the lease?

A. About February or March of 1946.

Q. Of this year? A. This year.

Q. What was the conversation about at that time, about the lease?

A. I think I can recall it to mind if I start at the beginning. It won't take long. We had a meeting in Los Angeles.

Q. Who did?

(Testimony of Melvin Philbrick.)

A. The Port Executives of the Pacific Coast, Seattle, Portland, San Francisco and San Pedro where we operate United Seamen's units. The question was, the shooting part having been over, we were determining needs and what certain units would be needed to be closed and others to continue, and in order to make plans we were asked at that meeting to review our leases and determine just where we did stand. So when I returned from Los Angeles I went to see Mr. Meyer, calling him on the phone and I told him I wanted to come in and talk about our lease, so as soon as I entered his office, [39] and before I had a chance to sit down, he said, as near as I can recall, "Your lease has expired and we would like to have you out of there." He said, "Our owner has been offered" oh, I believe the figure he mentioned was \$1,000 a month for the property we now had, and that was the first time Mr. Meyer and I ever discussed the lease.

Q. At that time did the question come up as to what he meant by that? A. No.

Q. Even at that time he did not contend such a contention as is being raised now?

Mr. Monell: I object to that.

The Court: I will sustain the objection. Reframe your question, Counsel.

Mr. Doyle: What, if anything, did he state on that occasion about the terminology of the lease as to the day that your time was beginning to run?

A. I just made a flat statement, and these were

(Testimony of Melvin Philbrick.)

his words, "Your lease has expired and we want you out."

Q. Did he say on what he based that?

A. No.

Q. He did not make any contention as to the basis of his proposition to you?

Mr. Monell: I object to the form of the question.

The Court: Sustained.

Q. (By Mr. Doyle): When you did have this conversation with Mr. Meyer, did he state to you, or elaborate to you, or indicate [40] to you what—

Mr. Monell: You have "indicate" in there.

Q. (By Mr. Doyle): Did he state to you what he meant by using the words "Cessation of hostilities in the war with Japan"?

A. I don't recall he did.

Q. (By the Court): Did you at any time receive a written notice of termination?

A. No, sir.

Cross-Examination

By Mr. Monell:

Q. In this meeting with Mr. Meyer, it was before March 1st? A. I believe it was.

Q. March 1st, 1946? A. Yes.

Q. At that time he discussed with you a renewal or extension of your lease to the end of December of this year, at a rate of \$150 greater than that covered by your present lease.

A. We discussed the thing, and as I said, I was

(Testimony of Melvin Philbrick.)

disturbed, because I knew the things we were doing and I hadn't finished, and when he said our lease was over with and he wanted us out, I plead with him, I think that term can be used, telling him that we were doing important work and we wished to continue. Mr. Meyer was sympathetic and understanding, but he said he had a responsibility to the owner of the building, and I recognize that. He said that they had this offer, and I [41] believe he mentioned \$1,000, but he did say he would see what could be done and let me know. Several days later I called him and I said, "Let's talk some more." I went over and he said he had talked to the owner and that the owner was willing to extend that period until the end of this year, 1946, providing the rental was increased by the amount of \$150.

Q. And also you were going to agree that certain installations and personal property would be surrendered with the premises at that time?

A. We discussed what would be left and what would be taken, and drew up a supplemental statement.

Q. And those papers were sent by you to the home office, and that is when the home office said, "You already have a lease. You don't have to do anything," and this suit was brought to clarify the position of all parties.

A. That is correct.

Redirect Examination

By Mr. Doyle:

Q. In this general port area conference at Los

(Testimony of Melvin Philbrick.)

Angeles, that was more of a general check-up, is that right? A. Yes.

Q. For the Port Area Executives in different parts of the country? A. That is true.

Q. When the matter was referred to your national headquarters in the New York office, you got instructions from your attorneys in New York as to the lease in question, is that [42] correct? In other words, you sent the papers on to home in New York. A. Mr. Dunne.

Q. The New York office sent it over to your attorneys and then back here, is that right?

A. That is about it. I don't remember exactly who started raising the questions, but it didn't take long for somebody with more knowledge along those lines than I to figure out there might be some question involved.

Q. As a matter of fact, during the regime you had down there in that capacity, is it not a fact that the defendant corporation has expended in excess of \$30,000 about the building and premises?

Mr. Monell: I object to that as incompetent, irrelevant and immaterial.

The Court: That fact would not aid the Court in interpreting the clause or phrase involved here.

Mr. Doyle: I appreciate that, but I wish to submit it for whatever it may prove to be worth in determination of the matter by the Court, because as I understand from the correspondence with the attorneys in New York, that they being dependent upon the public for funds to operate this place,

(Testimony of Melvin Philbrick.)

would not be pouring \$30,000 into a structure after which they might find themselves out in the street when the need was still great. They would not have authorized \$30,000.

The Court: I will allow it for the limited purpose of [43] indicating the extent to which moneys were used in furnishing or refurnishing the premises in question, and certainly, not to disclose the intent in the minds of the parties.

Q. (By Mr. Doyle): Is that not a fact?

A. The fact is, a good percentage of that money was spent before my term of office and part of it since.

Q. You have checked your books?

A. I have checked my books.

Q. And that sum of money has been spent by the defendant corporation for improvements?

A. Yes.

The Court: You would distinguish between improvements and operating expenses?

Mr. Doyle: Very definitely.

Q. So there will be no question about that, what does the \$30,000 consist of?

A. Mr. Fallon mentioned the heating and the hot water, and a part of the heating and the fire escape the owner paid half. We recovered all of the floors, the basement and main floor and two additional floors, completely repainting, and put in a lot of structures and partitions and things that might be usable in other types of activity; in other words,

(Testimony of Melvin Philbrick.)

permanent improvements. It is all permanent stuff. Lighting was a big factor and all those things will be left in the building.

Q. Have you a governing committee in San Francisco? A. Yes, sir.

Q. And you report to New York?

A. Yes, sir. [44]

Q. Do you sit in on the governing committee in San Francisco? A. Yes, sir.

Q. And the chairman of the governing committee is Mr. Fazackerly? A. Yes.

Q. During the time you have been Port Executive, was it your duty in that capacity to handle all the business affairs that involved the USS in San Francisco? A. That is correct.

Q. And initiate it? A. Yes.

Q. And you, depending upon what the subjects were, referred them to Mr. Fallon, or sent them on to New York? A. Yes, sir, that's right.

Q. At any time have you received any notice, directly or indirectly, oral or written, to the effect that the lessor considered the lease inoperative, or that you were served with any notice of tenancy eviction at any time? A. No.

Mr. Doyle: That's all.

Recross-Examination

By Mr. Monell:

Q. Mr. Philbrick, this \$30,000 of improvements, didn't you state the conditions about the premises were rather deplorable when you went in?

(Testimony of Melvin Philbrick.)

A. No, that was Mr. Fallon who made that statement.

Q. Were you connected with the United Seamen's Service on September of 1943? A. No.

Q. Are you at all familiar with the condition of the building at that time?

A. Only from what I have heard. [45]

Q. Then, you don't know how much of the money was spent to recondition the building and make it fit for occupancy? A. Yes, by our bills.

Q. Approximately how much of the \$30,000 was used for that purpose? A. All of it.

Q. There was no lighting equipment, no heating equipment, no hot water equipment, part of which you say was paid by the owner, all of which the United Seamen's Service had to put in in order to occupy the building?

A. That is the way I understand it.

Q. That was the time before you actually occupied it.

A. In order to make it available to occupy?

Q. Yes. A. Yes.

Q. That was known in advance by the officers of the United Seamen's Service?

A. They didn't know exactly how much it would be. They knew a rather heavy expenditure would be necessary because of the run-down condition of the building.

Q. That was open; there was nothing secretive about that? A. No.

Q. At the time of your discussion with Mr. Meyer, in February of 1946, did you state to him

(Testimony of Melvin Philbrick.)

that you did not think the lease had yet expired, or you disagreed with his construction of the terms of the lease?

A. No, I don't think so, Mr. Monell. Not being a lawyer, and as I say, being startled by his comment, I don't think I made any rebuttal contesting it. [46]

Q. As a matter of fact, you sent the papers east expecting to come back signed, didn't you?

Mr. Doyle: Just a minute. I object to that.

The Court: I will sustain the objection. I think we should have certain reasonable limitations here.

Mr. Monell: That's all.

Mr. Doyle: That's all.

The Court: This may be the subject of a stipulation, but did the papers in question include a memorandum of extension, or what were the papers in question?

Mr. Monell: The lessor prepared an extension of the lease under which there were three additional clauses, increasing the rent from \$400 to \$550 a month, and certain additional property was to be surrendered by the lessee, and under "C", anything contained in the attached lease, the lease as extended will terminate on December 1st, 1946, and they were supposed to sign that, and it was sent back and was not signed because of this difference of opinion as to the termination date.

The Court: And thereafter followed the litigation.

Mr. Monell: That's all.

JACK KAMAIKO

called as a witness for the defendant, sworn.

The Clerk: Please state your name to the Court.

A. Jack Kamaiko. [47]

Direct Examination

By Mr. Doyle:

Q. Mr. Kamaiko, what is your address?

A. 35 Orange Street, Brooklyn, New York.

Q. Are you connected with the defendant corporation? A. I am.

Q. In what capacity?

A. I am Field Representative from the national office.

Q. As Field Representative of the national office, what, generally are your duties?

A. I am responsible for the supervision of all units in the United States.

Q. You have duties in New York, traveling duties? A. That is correct.

Q. And in the course of your duties, eventually, I presume you visited the premises of, and supervised operations of the defendant corporation.

A. The United States, yes, sir. I just want to indicate we have two divisions of the organization. We have a domestic and foreign operations director.

Q. Which division do you belong to?

A. Domestic. Of course we are familiar with the others, but that is our responsibility.

Q. Did you feel you are somewhat familiar with the operation of the USS in San Francisco?

A. I have spent quite a bit of time here, and I am quite familiar with it. [48]

(Testimony of Jack Kamaiko.)

Q. How long have you been connected with the defendant corporation? A. Since May, 1943.

Q. In the establishment of the operations which are under your jurisdiction, upon what was the establishment and the continuance based upon?

Mr. Monell: I object to that as incompetent, irrelevant and immaterial, if your Honor please.

The Court: What is the purpose, Counsel?

Mr. Doyle: The purpose is the showing of the need of the continuance of this operation at this location.

The Court: We may assume that there is a need. Otherwise the overtures would not have been made in connection with the renewals, and the conversations would not have occurred with Mr. Meyer. It does not appear directly in the evidence; it appears by necessary inference.

Mr. Doyle: Have you ever received any correspondence or any communication from the lessor or anybody on his behalf prior to this litigation, that the lease was to terminate six months after hostilities ceased with Japan?

A. Before I came through, I examined the correspondence of the national office and did not find any such communications.

Q. And during your visit to San Francisco, you never received any communication from Mr. Meyer at any time? A. No, sir.

Mr. Doyle: That's all. [49]

(Testimony of Jack Kamaiko.)

Cross-Examination

By Mr. Monell:

Q. Mr. Kamaiko, you say you examined the correspondence: Didn't you find a letter somewhere in the month of March of this year in which the statement was made by Philbrick, or someone connected with the organization in San Francisco that it was the contention of the owner that the lease had expired, and a request was made for certain documents of extension?

The Court: I understood the question stated "Prior to that time."

Mr. Monell: No, the question was prior to this suit.

The Court: Very well.

A. (By the Witness): We recognize the whole thing arose when Mr. Philbrick wrote in asking for approval of this extension. Prior to that time we had no knowledge of it.

Q. (By Mr. Monell): But on or about the first of March, that is the first you knew there was a contention made by the owner that the lease had expired?

A. I was not operating in the national office and would not be familiar with it.

Q. That is the first indication, that correspondence, that the contention was made that the lease terminated?

A. That is correct.

Mr. Monell: That's all.

Mr. Doyle: That's all. Defendant's case, your Honor. [50]

The Court: Have you any further evidence?

Mr. Monell: No.

The Court: Submitted on the evidence?

Mr. Monell: Submitted on the evidence and on stipulations.

The Court: Yes, submitted on the evidence and on stipulations. I think that this case is one that justifies a memorandum. I think if Counsel will prepare that, it will aid the Court rather than any extended oral argument. I have your views pretty well in mind and the stipulations and the evidence have pointed out the underlying problem fairly well to the Court. There is one item that apparently may or may not have been overlooked, and that is, in Paragraph VI of the complaint a prayer is made for \$300 attorneys fees in connection with the alleged breach.

Mr. Monell: I don't think there is any issue on that because the answer does not deny it.

The Court: There may be a point involved as a matter of law, whether or not a petition or complaint for declaratory relief is that character of action that could be contemplated in that.

Mr. Doyle: My recollection of Federal procedure is that if a plaintiff, under the Annotated Code, is put to a suit, and includes in the allegations of the complaint a prayer for attorneys fees, I think that is allowable. [51]

The Court: At least there is no objection.

Mr. Doyle: No objection.

The Court: Very well. 10-10 and 5, and if you want additional time, I will grant additional time.

CERTIFICATE OF REPORTER

I, Fred J. Sherry, Jr., Official Reporter, certify that the foregoing 52 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ FRED J. SHERRY, JR. [52]

[Endorsed]: No. 11630. United States Circuit Court of Appeals for the Ninth Circuit. B. Samuels, Appellant, vs. United Seamen's Service, Inc., a non-profit organization, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed May 14, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11630

B. SAMUELS,

Appellant,

vs.

UNITED SEAMEN'S SERVICE, INC.,
a non-profit organization,

Appellee.

CONCISE STATEMENT OF POINTS ON AP-
PEAL AND DESIGNATION OF RECORD
NECESSARY FOR CONSIDERATION
THEREOF AND TO BE PRINTED

The appellant herein presents her concise statement of points on which she intends to rely on her appeal from the judgment in favor of appellee herein as follows:

Appellant commenced an action for declaratory relief against the appellee to have interpreted the provisions of a lease between appellant as lessor and appellee as lessee, which lease was executed on September 15, 1943, for a term of years commencing September 15, 1943, and (in the language of the lease)

“extending for a period of six (6) months from and after the cessation of hostilities in the present war with Japan.”

There was no agreement between the parties other than the lease itself and no discussion as to the meaning of the language employed.

It was, and is, the contention of appellant that, as a matter of law, the date from which the period of termination was to be computed was either August 14, 1945 (VJ Day) or, at the latest, September 1, 1945, the date of the signing of the formal surrender of Japan on the USS Missouri.

The Court below in its "Findings of Fact and Conclusions of Law" found, as a legal conclusion, "that there has been no cessation of hostilities or termination of the war" and "that said lease and the provisions thereof are operative"; "that said lease is still in full force and effect; that there has been no termination of defendant's leasehold interest by operation of law or efflux of time; the event, period or time has not yet arrived when the term of six months commences to run" and "that defendant is entitled to judgment together with costs and disbursements expended or incurred herein."

The judgment entered followed the language above quoted from the Conclusions of Law.

It is appellant's respectful contention that the learned Court below erred in each of the conclusions above set forth and in entering the judgment in accordance with said conclusions.

It is further appellant's respectful contention that the Court should have found, as a matter of law, that said lease expired six months after August

14, 1945, or, at the latest, six months after September 1, 1945.

Appellant hereby designates the entire record on appeal, certified by the Clerk of said District Court, as necessary for the consideration of the appeal and to be printed, including this document. All filing marks shall appear in the printed record, but the titles of court and cause, and names and addresses of attorneys, appearing above the captions, shall be omitted.

Dated June 2, 1947.

/s/ THEODORE M. MONELL,
Attorney for Appellant.

Receipt of a copy of the foregoing is hereby admitted this 2nd day of June, 1947.

/s/ J. J. DOYLE,
Attorney for Appellee.

[Endorsed]: Filed June 3, 1947.

